SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

October Term, 1967

No. 685

SIDNEY J. UNGAR,

*Petitioner,*

v.

THE ASSOCIATION OF THE
BAR OF THE CITY OF NEW YORK,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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Petitioner prays that a writ of certiorari issue to review the order of the Appellate Division, First Department, of the Supreme Court of the State of New York, entered on April 25, 1967, denying petitioner's motion to reconsider and vacate its order of April 21, 1966 disbarring petitioner from practice as an attorney and counselor at law.

## OPINION BELOW

The opinion of the court below is reported at ____A. D.2d____ ,282 N.Y.S. 2d 158.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). The order of the Appellate Division was entered on April 25, 1967. On July 7, 1967, the Court of Appeals of the State of New York entered an order denying petitioner leave to appeal.

## QUESTIONS PRESENTED

1. Whether disbarment is a criminal sanction within the scope of the Fifth Amendment, as incorporated in the Fourteenth Amendment with respect to state action, so that incriminating testimony compelled under a grant of immunity is precluded from use in the disciplinary proceeding.

## CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V

No person * * * shall be compelled in any criminal case to be witness against himself * * *.

United States Constitution, Amendment XIV

Section 1 * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

## STATEMENT OF CASE

Petitioner was admitted to practice as an attorney and counselor at law in the State of New York on November 4, 1935. On April 21, 1966, in disciplinary proceedings brought by the Association of the Bar of the City of New York, the Appellate Division of the Supreme Court of the State of New York, First Department, entered an order of disbarment which the New York Court of Appeals declined to review on July 7, 1966. Petitioner filed a petition for a writ of certiorari in this Court on November 4, 1966, which was denied on January 9, 1967. *Ungar v. Bar Association*, 385 U.S. 1006. On March 9, 1967, petitioner filed a motion in the Appellate Division for reconsideration and vacation of the disbarment order in the light of this Court's decisions in *Spevack v. Klein*, 385 U.S. 511 and other cases. This motion was denied on April 25, 1967, and leave to appeal was denied by the Court of Appeals on July 7, 1967.

The disciplinary charges grew out of advances of approximately $4,000 made by petitioner in February, March and April of 1958 for remodeling the apartment of Hulan E. Jack, then president of the Borough of Manhattan. In December 1959, the district attorney commenced an investigation and thereafter presented the matter to the grand jury. On December 15, 1959, petitioner appeared before the grand jury, asserted his constitutional privilege against self-incrimination, was directed to testify, was granted immunity from prosecution for any criminal offenses disclosed in his testimony, and testified for ten days. Thereafter, Jack was indicted and convicted on charges of violating conflict-of-interest provisions in the New York City Charter and conspiracy to obstruct justice. On the basis of statements made while testifying in the second

Jack trial, petitioner was thereafter convicted for criminal contempt. *Ungar v. Sarafite*, 376 U.S. 575.

The charges in the disciplinary proceeding were: (1) as a result of conduct in the second Jack trial, petitioner "was found guilty of criminal contempt of court"; (2) during the course of the trial, he "shouted at the court * * * in the immediate hearing and presence of the jury, 'I am being coerced and intimidated, the court is suppressing the evidence' "; (3) he "aided and abetted Hulan E. Jack in violating Sections 886 and 901 of the New York City Charter" by making certain payments for Jack's benefit; and (4) he conspired with Jack "to obstruct justice and the administration of the New York City Charter * * * in violation of Penal Law, Section 580" by concealing these payments.

Petitioner's answer to the charges admitted his conviction for criminal contempt and his making the statement upon which the conviction was based, but denied that he had been guilty of any professional misconduct or that his conduct justified the conviction. He denied the other charges. Among several affirmative defenses, petitioner claimed that the charges of aiding and abetting Jack in the City Charter violations and of conspiring to obstruct justice violated his constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law because his testimony with respect to these matters before the grand jury had been obtained under a grant of immunity. The Appellate Division struck petitioner's affirmative defenses as insufficient in law and denied petitioner's motion for leave to appeal from this order to the Court of Appeals. The Referee's report sustaining the charges was confirmed by the Appellate Division and the disbarment order was entered. The Court of Appeals denied petitioner's motion for leave to appeal and

dismissed his appeal taken as of right on the ground "that there are no substantial constitutional questions directly involved."

The petition filed in this Court on November 4, 1966, and denied on January 9, 1967, submitted as reasons for granting the writ (1) that the immunity granted to compel petitioner's testimony before the grand jury precluded his testimony from being the basis of disciplinary charges; (2) that procedural due process was violated (a) in permitting petitioner's conviction for criminal contempt to be made a basis of disbarment, although the hearing with respect to criminal contempt was not appropriate for a disbarment penalty, (b) in trying petitioner in the disciplinary proceeding for the criminal charge of aiding and abetting a violation of the City Charter without adequate procedural safeguards, and (c) in finding petitioner guilty of obstruction of justice in the disciplinary proceeding without proper notice of such a charge; and (3) that substantive due process was violated because the severe punishment of disbarment in the circumstances was not reasonably related to the legitimate interest of the State in regulating the practice of law.

The Appellate Division denied petitioner's motion of March 9th for reconsideration on three grounds: (1) Petitioner expressly abandoned his reliance on his federal privilege against self-incrimination. (2) The self-incrimination privilege as defined in *Spevack v. Klein* "does not inhibit the use in a disciplinary proceeding of testimony" compelled under a grant of immunity because "it has not been held that a disciplinary proceeding is in the nature of a criminal cause." And (3) the disciplinary charges based upon petitioner's contempt adjudication and his "contumacious conduct in the trial of *People v. Jack*" were "sufficient to warrant disbarment."

## REASONS FOR GRANTING THE WRIT

1. The express articulation by the Appellate Division of the holding, as one ground for its decision, that a disbarment proceeding is not a "criminal case" within the meaning of the privilege against self-incrimination raises an important and heretofore unresolved question with respect to the interpretation of the Fifth Amendment to the Constitution, as incorporated in the Fourteenth Amendment, which warrants review by this Court.[1]

The compulsion of incriminating testimony generates an immunity from sanctions which are "criminal in nature" (*Ullmann v. United States*, 350 U.S. 422, 431) whether or not immunity from a particular sanction is contemplated when the testimony is compelled. *Garrity v. New Jersey*, 385 U.S. 493. When petitioner invoked his privilege against self-incrimination in declining to testify before the grand jury, compelling him to testify by conferring immunity barred the use of this testimony not only in a trial on criminal charges but also in any proceeding which might result in the imposition of a penalty of a criminal nature.[2]

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[1] For reasons which we discuss later, we do not believe the two independent grounds of decision upon which the Appellate Division relied in denying the motion for reconsideration should preclude review of the Appellate Division's holding with respect to the scope of the Fifth Amendment.

[2] We do not have the question whether the federal government is precluded from using testimony compelled by a state under a grant of immunity. *Cf. Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 54. The evidence here involved was exacted by a state prosecuting attorney and, after a request for disciplinary action by the prosecuting attorney, was subsequently used as a basis for disbarment.

The immunity is "as broad in scope as the privilege it replaces." *Stevens v. Marks*, 383 U.S. 234, 246; *Ullmann v. United States*, 350 U.S. 422, 431. Accordingly, if disbarment is "criminal in nature" petitioner was privileged to refuse to give testimony incriminating with respect to disbarment (Cf. *Spevack v. Klein, supra*) and the immunity granted to obtain information would extend to a disbarment proceeding. See *Ullmann v. United States*, 350 U.S. 422, 431.

Thus the question is squarely posed whether a disbarment proceeding is a "criminal case" within the meaning of the Fifth Amendment's prohibition against compelled, self-incriminating testimony. Although many decisions of this Court intimate an affirmative answer none is dispositive on the point.

In *Spevack v. Klein*, 385 U.S. 511, expressly overruling *Cohen v. Hurley*, 366 U.S. 117, the Court held that the privilege against self-incrimination is available to attorneys and that disbarment is a punishment which cannot be imposed for invoking the privilege and refusing to testify in an investigation of the conduct of attorneys. In *Kaye v. Coordinating Committee*, 386 U.S. 17, which involved a claim that use of compelled testimony in the disciplinary proceeding violated the privilege against self-incrimination, the Court, *per curiam*, vacated the disbarment order and remanded the case for reconsideration in light of *Spevack v. Klein*. Similarly, in *Zuckerman v. Greason*, 386 U.S. 15, rehearing denied, 386 U.S. 969, the Court, *per curiam*, vacated an order disbarring one attorney and suspending another which was based on the testimony and records of the attorney.

These cases are not necessarily decisive of the question presented here. *Spevack* decided that an attorney can

invoke the privilege in a disciplinary investigation (possibly to avoid incrimination with respect to a statutory crime) but did not expressly hold that it can be invoked with respect to the sanction of disbarment. *Kaye* involved the penalty of an adverse presumption because of his failure to testify as well as the use of compelled testimony in the disciplinary proceeding. Similarly, *Zuckerman* involved the greater punishment of disbarment rather than suspension because the privilege was invoked. Since the Court wrote no opinion in the latter two cases, the precise rationale of the decisions cannot be ascertained.

A question closely related to that presented here was raised but left unanswered in *Ullman v. United States*, 350 U.S. 422, where the constitutionality of an immunity statute was assailed on the ground that the testimony compelled under a grant of immunity might result in disqualification from federal employment and other disabilities. Eschewing a decision as to whether such disqualification was equivalent to criminal punishment for purposes of the self-incrimination privilege, the Court's majority opinion, upholding the validity of the statute, stated that a witness who is compelled to answer under the protection of immunity "has, of course, when a particular sanction is so sought to be imposed against him, the right to claim that it is criminal in nature." 350 U.S. at 431. Mr. Justice Douglas' dissenting opinion asserted, however, that "disabilities imposed by federal law [such as "ineligibility for employment in the Federal Government and in defense facilities, disqualification for a passport, the risk of internment, the risk of loss of employment"] are forfeitures within the meaning of our cases and as much protected by the Fifth Amendment as criminal prosecution itself." 350 U.S. at 440-441.

The holding of the court below that the privilege "does not inhibit the use in a disciplinary proceeding of testimony resulting from respondent's [petitioner here] immunity from prosecution therefor" and that a disciplinary proceeding is not "in the nature of a criminal cause" appears to be at odds with the decisions of this Court holding forfeitures within the protection of the privilege. *Boyd v. United States,* 116 U.S. 616; *Lees v. United States,* 150 U.S. 476; *cf. Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 701. Certainly, the forfeiture of one's right to practice his profession or to other employment is no less a penalty than forfeiture of his property. The continued vitality of the *Boyd* case was underscored by the reaffirmation in *Spevack v. Klein* "of the broad protection given the privilege" in *Boyd v. United States,* 116 U.S. 616, which the opinion of Mr. Justice Douglas described as a case "where compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself" (385 U.S. at 515). Mr. Justice Douglas also noted that the "views expounded in the dissents in *Cohen v. Hurley* [now overruled] need not be elaborated again." Among the "views" so "expounded" were those of Mr. Justice Black that the effects of disbarment were so severe as to entitle a lawyer to "the full benefit of the 'law of the land' " (366 U.S. at 147) and those of Mr. Justice Douglas that "taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction" (366 U.S. at 153-154).

Disbarment or denial of the right to engage in other occupations has been held equivalent to a criminal penalty for the purpose of other constitutional provisions in a number of decisions. Disqualification from the practice of law, as well as the pursuit of other vocations, has been regarded as punishment for purposes of the Constitution's

bill of attainder and ex post facto prohibitions. *Ex parte Garland*, 4 Wall. 333, 377 (legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"); *Cummings v. Missouri*, 4 Wall. 277, 327 ("This deprivation [of right to pursue regular avocations] is punishment"); *United States v. Lovett*, 328 U.S. 303, 316 ("permanent proscription from any opportunity to serve the Government is punishment"); *United States v. Brown*, 381 U.S. 437 (disqualification from holding union office held punishment). Disqualification from the pursuit of one's vocation should also be regarded as equivalent to criminal punishment for purposes of the privilege against self-incrimination. The contrary holding of the court below warrants review by this Court.

The additional grounds of decision advanced by the court below should not deter the grant of a writ of certiorari because (1) the finding of abandonment of the constitutional privilege is not binding on this Court which will re-examine factual determinations bearing on constitutional claims and (2) the determination that "the charges based on the contempt adjudication * * * are sufficient to warrant disbarment" raises other constitutional questions.

2. Contrary to the finding of the court below, petitioner did not abandon his claim based upon the privilege against self-incrimination but clearly asserted it in the Appellate Division and preserved it in his attempts to appeal to the Court of Appeals.[2a] The Fifth Affirmative Defense in petitioner's answer to the disciplinary charges asserted "that the institution of the instant disciplinary proceeding on the basis of the matters" concerning which he testified before the grand jury "is a violation of his

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[2a] See Appendix, pp. A-6 to A-9

constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law." Respondent moved to strike this defense for the reason that petitioner's "federal constitutional privilege against self-incrimination is not involved * * * inasmuch as a disciplinary proceeding is not a prosecution for crime" and "that such a proceeding was not within the ambit of the immunity tendered to respondent in the proceeding before the grand jury."

The finding of express abandonment of the privilege appears to be based on the statement of petitioner's counsel in an affidavit of February 27, 1963, in opposition to the motion to strike, that it did not appear "that the self-incrimination provisions of the Federal Constitution are involved" and that there were grounds for "striking out the reference to the Federal Constitutional privilege against self-incrimination." But the affidavit went on to make clear that it persevered in the constitutional claim and conceded only that it might better be phrased in terms of due process under the Fourteenth Amendment rather than self-incrimination under the Fifth Amendment. Thus, the affidavit opposed "striking out the reference to the federal constitutional privilege against self-incrimination" stating, "We see no necessity to take such action with respect to a legal argument, particularly since it would require respondent to amend the answer by adding the words 'under the State Constitution and his right to due process of law under the Federal and State Constitutions.' " The propriety of petitioner's reliance upon the due process clause in connection with the self-incrimination claim was established more than a year later when this Court held in *Malloy v. Hogan*, 378 U.S. 1, on June 15, 1964, that the self-incrimination prohibitions of the Fifth Amendment are applicable to the States through incorporation in the due process clause of the Fourteenth Amendment.

Notwithstanding the adverse posture of this Court's decisions at the time, after its alleged abandonment, petitioner continued to assert the claim of privilege both in the Appellate Division and in the Court of Appeals.[3] He filed in the Appellate Division a notice of motion and affidavit dated April 22, 1963, seeking leave to appeal to the Court of Appeals from the order of March 21, 1963, striking the affirmative defenses. The notice of motion set forth as a question for review "Whether the granting of immunity to respondent by virtue of his testimony before a grand jury does not include protection against a disciplinary proceeding." A supporting affidavit stated that "the questions involve matters * * * of constitutional law (fifth affirmative defense)" and prayed leave to appeal upon the questions of constitutional law set forth in the fifth affirmative defense.

In the Court of Appeals petitioner's affidavit in support of his motion for leave to appeal from the order of disbarment specifically referred to the affirmative defenses set forth "as paragraphs 6 through 27 of my answer in this disciplinary proceeding." The fifth affirmative defense was set forth in paragraphs 19 and 20 and was clearly embraced within the enumerated paragraphs. Although petitioner purported to rely "principally" on the fourth and sixth affirmative defenses, his reluctance to place particular stress on the fifth affirmative defense is readily understandable in light of this Court's decision in *Cohen v. Hurley* (which has since been overruled) and the Court of Appeals' decision in *Spevack v. Klein*, 16 N.Y. 2d 1048, 213 N.E. 2d 457 (which has since been reversed).

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[3] *Malloy v. Hogan*, 378 U.S. 1, did not resolve the question whether *Cohen v. Hurley*, 366 U.S. 117, remained vital. The Court of Appeals continued to rely on it. *Spevack v. Klein*, 16 N.Y. 2d 1048, 213 N.E. 2d 457; 17 N.Y. 2d 490, 214 N.E. 2d 373.

The claim of the privilege was reiterated in an affidavit verified June 7, 1966, in support of a "motion for an order amending the within disbarment order of April 21, 1966 by inserting in said order a provision that in this disciplinary proceeding there were presented and necessarily passed upon questions under the Constitution of the United States, viz., whether respondent's rights under the Fifth, Sixth and Fourteenth Amendments were violated and that the courts held that they were not."

Petitioner's continued assertion of the constitutional claim in various forms is not consonant with the conclusion of the court below that the claim was "expressly abandoned."[4] "There is a presumption against a waiver of constitutional rights * * *, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege' ". *Brookhart v. Janis,* 384 U.S. 1, 4. If every reasonable presumption against the waiver of fundamental constitutional rights is indulged (*Johnson v. Zerbst,* 304 U.S. 458, 464; *Glasser v. United States,* 315 U.S. 60, 70), the "high standards of proof for the waiver of constitutional rights" to establish that "the waiver is made voluntarily, knowingly, and intelligently" (*Miranda v. Arizona,* 384 U.S. 436, 475) have obviously not been met.

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[4] The receptiveness of the court below to the argument of abandonment is perhaps illustrated by the statement in its first opinion on the denial of reconsideration that petitioner did not raise the question "on his application for a writ of certiorari to the Supreme Court" which it later corrected. The opinion of the Appellate Division dated April 25, 1967 (282 N.Y.S. 2d 155) stated, "He did not raise the question in the Court of Appeals but did on his application for a writ of certiorari to the Supreme Court." An amended opinion dated April 26, 1967 (282 N.Y.S. 2d 158) stated, "He did not raise the question in the Court of Appeals but did on his application for a writ of certiorari to the Supreme Court." Both opinions are reprinted in the Appendix to this petition.

3. The holding of the court below that the charges based upon the contempt adjudication and petitioner's contumacious conduct in the Jack trial are sufficient to warrant disbarment is not an adequate state ground of decision which should preclude review by this Court since that determination itself involves questions of procedural and substantive due process under the Fourteenth Amendment.

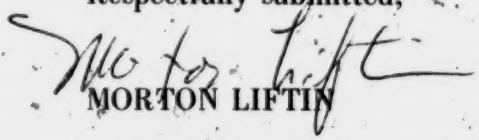
In the petition for certiorari filed November 4, 1966, denied by this Court on January 9, 1967, petitioner urged as reasons for granting the writ (1) that the hearing on the criminal contempt conviction, although upheld for the relatively minor contempt punishment (*Ungar v. Sarafite*, 376 U.S. 681), did not satisfy due process standards for the severe punishment of disbarment (See *Cheff v. Schnackenberg*, 384 U.S. 373; *United States v. Barnett*, 376 U.S. 681; *Speiser v. Randall*, 357 U.S. 513, 520-521; *In Re Murchison*, 349 U.S. 133; *In Re Oliver*, 333 U.S. 257; *Cooke v. United States*, 267 U.S. 517; *Tumey v. Ohio*, 273 U.S. 510) and (2) that the extreme penalty of disbarment in the circumstances was so unrelated to the State's proper interest in regulating membership in the bar as to constitute a violation of substantive due process (*Schware v. Board of Bar Examiners*, 353 U.S. 232; *Gibson v. Florida State Legislative Comm.*, 372 U.S. 539, 546; *DeGregory v. New Hampshire Atty. Gen.*, 383 U.S. 825, 829; *Trop v. Dulles*, 356 U.S. 86, 114; *In Re Isserman*, 345 U.S. 286, together with *In re Disbarment of Isserman*, 348 U.S. 1; *Sacher v. Association of the Bar*, 347 U.S. 388). In view of the action of the Court on the petition previously filed, these contentions are not advanced as reasons for granting certiorari at this time. Since the denial of certiorari imports no views on the merits, however, these points will be argued if certiorari is granted to review the holding of the court below that the privilege against self-incrimination may not be invoked with respect to the sanction of disbarment.

4. Review of the decision below by this Court appears appropriate because the court below has decided a question of substance under the United States Constitution not heretofore determined by this Court and in a manner which appears to be contrary to the holdings of this Court in closely related situations. The importance of the question and the desirability that it be settled is attested by the fact that it is present in cases involving at least three other attorneys (Kaye, Zuckermann and Haber) now pending in the New York courts. [5]

## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,



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[5] The Court of Appeals in *In re Zuckerman and Haber,* 19 N.Y. 2d 977,281 N.Y.S.2d 528, decided June 1, 1967, in reversing the order of the Appellate Division, Second Department, of March 20, 1967 (280 N.Y.S. 2d 904), held that " The reversal by the United States Supreme Court of the orders in the disciplinary proceedings, with remand to the Appellate Division, leaves room for interpretation. Consequently due process required notice to appellants and opportunity to be heard" before further determinations were made by the Appellate Division.